

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MELISSA WISS)	
Claimant)	
)	
VS.)	
)	
LEAR SIEGLER SERVICES, INC.)	
Respondent)	Docket No. 251,851
)	
AND)	
)	
NATIONAL UNION FIRE INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the August 4, 2003 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on January 27, 2004.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Matthew Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant was entitled to a 10 percent impairment to her right upper extremity (at the level of the forearm) for residual complaints due to carpal tunnel syndrome as a result of her July 14, 1998 work-related injury. The ALJ declined to award permanency for either the right or left scapholunate disassociation, as he believed the medical evidence failed to establish a causal connection between that condition and her

work.¹ He specifically stated “discovery of the right scapholunate disassociation was merely serendipitous, that this was a preexisting condition which existed in both of the [c]laimant’s upper extremities and which was by chance discovered in the course of treating the [c]laimant’s right carpal tunnel syndrome.”²

Claimant requests review of the Award, alleging she sustained bilateral upper extremity injuries that entitle her to an increased functional impairment, not just to a single scheduled member, but to the body as a whole, along with a substantial work disability for her work related injury.

Respondent requests the ALJ’s Award be affirmed in all respects. But, in the alternative, should the Board find claimant suffered a general body disability, respondent argues a wage should be imputed to claimant based upon her demonstrated ability to earn \$260 per week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent in January 1998 as a supply clerk. This job involves the process of accepting and logging in parts utilized in the reconditioning of equipment, as well as gathering and delivering those parts necessary for any given reconditioning project.

It is uncontroverted that on July 14, 1998, claimant was responding to a request for supplies. She was in the process of unrolling a new roll of felt when she experienced a distinct “pop” in her right wrist. Immediately after, she noticed a little bump on her right wrist. After carrying eight U-bolts across her work area (each weighing between 4 and 10 pounds) with both hands, she notified her supervisor of the accident. Claimant worked the balance of the day.

There is some confusion as to whether claimant immediately experienced pain in her left wrist following this accident. At the preliminary hearing, claimant testified that after her accident, she used her left hand to compensate for her right hand complaints and as a result, her left hand became symptomatic. In contrast, claimant testified at the regular hearing that she suffered pain in both hands immediately after hearing the “pop” and

¹ Award at 7.

² *Id.*

carrying the heavy U-bolts. However, when claimant reported her injury that same day to her supervisor, she only mentioned the right hand and only the right hand was disclosed on the accident report.

Claimant was sent to an occupational medicine facility for treatment. She was referred to a local orthopaedist who, after taking some x-rays, concluded he could not treat her and referred her on to Dr. E. Bruce Toby at Kansas University Physicians, Inc.³ When Dr. Toby first saw claimant, he diagnosed “probable scapholunate laxity bilateral[ly], worse right than left.”⁴ Dr. Toby also suggested arthroscopic surgery to the right wrist, but that procedure was not done at that time.

Claimant was then directed to Dr. J. Mark Melhorn, an orthopaedic surgeon, who first evaluated claimant on November 19, 1998. As of this initial visit, Dr. Melhorn did not know of Dr. Toby’s diagnosis nor had those treatment records been forwarded to him. Dr. Melhorn’s office notes reflect claimant’s physical complaints were solely to her right wrist and elbow. However, Dr. Melhorn admits that in performing his examination, claimant verbally expressed some tenderness in her left wrist. He treated her with medication and recommended she return in a few weeks.

By the next visit on December 3, 1998, Dr. Toby’s records had been made available to Dr. Melhorn. He noted that Dr. Toby had diagnosed scapholunate laxity in both the left and right wrists, with the right causing more pain, and had also suggested surgery to address the problem. Dr. Melhorn ordered a 3 phase bone scan along with some other diagnostic tests. He continued to treat her conservatively and eventually diagnosed carpal tunnel syndrome in her right hand, along with a ganglion cyst. Surgery was performed on May 6, 1999, to address the carpal tunnel syndrome and to remove the cyst. By June 1999, she was returned to work. For a period of time, her right hand activities were limited. As a result, claimant says she worked a significant amount of time with her left hand only or used her left hand more than she normally would, given the complaints in her hand. At the preliminary hearing, claimant testified her left hand gradually began to cause her pain during this period of time.⁵

³ Dr. Toby was not deposed, although his records were shared with the other testifying physicians. It is clear that the physicians utilized his records for purposes of diagnosis and substantiating their opinions and neither party has voiced any objection to the use of these records. Both parties referred to them at oral argument. Thus, the Board deems them to be stipulated into evidence. See K.S.A. 44-519 (Furse 1993).

⁴ Melhorn Depo., Ex. 1 (Dr. Melhorn’s December 3, 1998, referring to Dr. Toby’s office note of July 29, 1998.)

⁵ P.H. Trans. at 18.

Dr. Melhorn released her at maximum medical improvement on November 30, 1999, and recommended she perform only “medium” work, limiting her lifting to no more than 50 pounds. Dr. Melhorn assigned a 7.05 percent permanent partial impairment to the level of the right forearm, based upon the American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).⁶

Although she returned to work and was accommodated, claimant was let go in an economic layoff in September 1999. According to Pierre Pauquette, the production supervisor, two employees had to be laid off. He testified claimant volunteered to be laid off. There is no documentation or corroboration contained within the record to substantiate this assertion. Claimant denies she volunteered for layoff and maintains that she was told she was to be let go. Her last day of work for respondent was September 9, 1999.

In March 2000, at the direction of her counsel, claimant went to see Dr. Lynn D. Ketchum, a board certified plastic surgeon who specializes in the treatment of upper extremities. Dr. Ketchum confirmed claimant verbally expressed bilateral hand complaints to him during this first visit. He further confirmed that her pain diagram was consistent with those verbal complaints. Following an examination as well as an EMG, Dr. Ketchum ruled out carpal tunnel syndrome, but concluded she had a recurrent volar wrist ganglion cyst, as well as a 4-mm scapholunate separation in the right wrist and a 3-mm separation in the left wrist.⁷ According to Dr. Ketchum, a 2.5-mm gap is considered normal. Dr. Ketchum recommended surgery to correct the disassociation in the right wrist.

Following a preliminary hearing, Dr. Ketchum was authorized to treat claimant’s right upper extremity only. He performed surgery in January 2001 to remove the ganglion cyst and repaired the scapholunate separation by installing a screw to minimize the separation. He continued to treat her throughout 2001 and 2002, as the hardware in her right wrist became unstable and had to be reinstalled and ultimately removed.

When asked to explain claimant’s condition and how it could be related to her job, Dr. Ketchum testified he believes claimant not only had an ongoing stretching of the ligaments supporting the scaphoid and lunate areas of her wrists, but the process of unrolling the felt on July 14, 1998, was, in his words, the “straw that broke the camel’s back.”⁸ Dr. Ketchum explained that between the scaphoid and lunate areas of the hand, there is a tremendous amount of pressure and the two areas naturally want to move apart.

⁶ Unless otherwise stated, all references are to the AMA *Guides* (4th ed.).

⁷ Ketchum Depo. at 6, Ex. 2.

⁸ *Id.* at 32.

However, ligaments support the area and hold the two together.⁹ He further confirmed that a scapholunate tear can be caused by overuse, as well as an acute injury.¹⁰ As for the left wrist, he further believes that claimant strained or stretched the same ligaments across her left scapholunate joint on July 14, 1998 and thereafter, as she was compensating for the symptoms in her right hand and wrist. Dr. Ketchum did not believe the separation in her left wrist required any surgical treatment. As for permanency, Dr. Ketchum assigned a 20 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity which, when converted and combined, yields a 15 percent impairment to the body as a whole. The 20 percent impairment in the right upper extremity consists of 10 percent for grip strength loss due to residual carpal tunnel syndrome and 10 percent for the scapholunate disassociation.

Upon cross-examination, Dr. Ketchum's opinion on the issue of the left hand and its involvement in this claim was the focus of an extensive discussion and, ultimately, became somewhat obscured.

Q. (By Mr. Crowley) I'm not asking you the basis for the rating, but the basis of your opinion for causation. Do you understand that?

A. Yes.

Q: I didn't know if I made that clear.

A. Well, in looking at the records I readily admit that her symptoms have primarily throughout been on the right and have been a minimum on the left. Her condition on the left is very mild, and she had a good grip strength, a good range of motion.

So yes, I think that the rating on the left is probably not attributable to anything other than the fact that she marked when I first saw her pain in that area and that she had a widening of that joint space.

Q. So I understand, correct, that you are now saying that the impairment that you've offered for the left upper extremity is not related to her employment or any injury arising from that employment while working for Lear Siegler?

A. It is -- I think in looking at the records and the fact that there is a minimal number of complaints on the left, that that is a valid conclusion.¹¹

⁹ *Id.* at 31.

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 50-51.

On redirect, claimant's counsel attempted to clarify and rehabilitate Dr. Ketchum.

Q: [By Mr. Cooper] Doctor, I want to ask you some questions. I think counsel has confused you on some things. When you saw her, she had complaints in both upper extremities, correct?

A. Yes.

Q. And did she tell you that those complaints in her opinion were attributable to work activities?

A. In my initial workup of Ms. Wiss on 3/8/00, I state that Ms. Wiss presents with problems of both upper extremities, right worse than left, which she denies having prior to beginning work at Lear Siegler on January 21st, 1997. Was that a response?

Q. I think that's what I was asking you. As far as you're aware, based on reviewing all the other records, did she have any prior problems with either upper extremity prior to going to work for Lear Siegler?

A. Not that she stated. I did ask her specifically and underlined it twice that she did not in my own notes.

Q. She clearly had symptoms when she saw you?

A. Yes.

Q. And do you whether or not she worked anywhere between September of '99 and March 8 of 2000?

A. No, I wasn't aware.

Q. In fact, at the time that you met with her she filled out a form that said that she was unemployed, did she not?

A. Yes.

Q. If we assume that she worked nowhere between the time that she was laid off by Lear Siegler on September 9th of 1999, and the time you saw her on March 8 of 2000, and that she had no problems before she went to work at Lear Siegler, do you have an opinion as to what the most probable cause of her complaints in both her left and right upper extremity would be?

A. Well –

Q. And further taking into consideration your history that you took from her?

- A. I think one could logically conclude that it would be the work that she did at Lear Siegler.

* * * * *

But on recross the waters were again muddied:

- Q. So the opinion you've offered, that it's more probable that her left-handed problems started with Lear Siegler, are based upon her rendition of what she did?
- A. Yes.
- Q. And therefore, your opinion is only possible either way?
- A. Yes.¹²

Dr. Melhorn was asked to see claimant again in November 2002. By that time, claimant had undergone several surgeries to her right wrist, the last one to remove the problematic hardware Dr. Toby installed during an earlier surgical procedure. During this visit, claimant voiced complaints about her left wrist, but Dr. Melhorn concluded any such problems were not attributable to claimant's work, as she had long since left respondent's employ.¹³ Accordingly, Dr. Melhorn did not alter his opinion on either permanency or restrictions. When questioned about the nature of claimant's condition and her description of the mechanism of injury, Dr. Melhorn opined that it would be unusual for an injury such as this to occur during the act of unrolling an 8-pound roll of felt and carrying U-bolts. He never explained nor was he asked why he did not diagnose or treat the scapholunate disassociation in either wrist.

At her counsel's request, Dr. Sergio Delgado, a board certified orthopaedist, provided an evaluation in March 2003. Dr. Delgado diagnosed median nerve entrapment or irritation of the right wrist, weakness and limitation of extension compatible with a scapholunate disassociation. Dr. Delgado testified that the "pop" claimant experienced is consistent with the tear of the ligament in right wrist. He further diagnosed a radial nerve neuroma as a result of surgery. As for claimant's left hand and wrist, he diagnosed possible tendinitis or possible carpal tunnel syndrome consistent with an overuse syndrome. Put simply, Dr. Delgado testified that claimant hurt her right wrist, had surgery and had over used her left hand to compensate.¹⁴

¹² *Id.* at 52-54, 64.

¹³ Melhorn Depo. at 17-18.

¹⁴ Delgado Depo. at 6.

Dr. Delgado assigned a 27 percent impairment of function rating to the right upper extremity at the level of the wrist, along with a 5 percent to the left upper extremity. When converted and combined, this yields a 19 percent to the body as a whole. He imposed limits on gripping and pinching with the right hand only, but added that if the left hand becomes more symptomatic, then the restrictions should apply to both hands.¹⁵

Since leaving her position with respondent, claimant has had several jobs, none of which provided a comparable wage. Her first position came in March 2000 and was as a receptionist in Clay Center, Kansas. That job was full time and paid \$6.50 an hour, plus overtime. There is no evidence that she was unable to perform this job given her physical limitations. Unfortunately, that job was eliminated on April 18, 2001 due to the economy. In August 2001, she obtained employment with a Head Start program as a bus driver. That position paid \$6.50 per hour, but involved less than full-time hours, working just 25 to 30 hours per week. She ceased working for Head Start in March or April 2002. After that, claimant entered into a business relationship with another individual to operate a daycare. That lasted only until July 2002 and generated minimal income. Claimant then opened up her own daycare facility in August 2002 and presently earns \$187 to 200 per week.

Monte Longacre was asked to evaluate claimant's vocational history and opine as to what sort of wage claimant might expect, given her past work history and her physical limitations. According to Mr. Longacre, claimant could expect to make \$6.50 per hour as a receptionist or as a data entry clerk. According to Mr. Longacre, claimant professed to earning as much as \$225 per week at her in-home daycare business. Claimant testified she had tried to find a job outside her home and community, but was advised, on the one hand, that she was overqualified and, on the other, that her office skills required refreshing. She testified she is not presently looking for another position, as she doesn't have time. Moreover, claimant maintains she would have to pay for daycare, and the prevailing wage for positions which she is qualified for would not pay enough to cover the cost of child care and still provide a living wage.

Mr. Longacre provided a list of 25 unduplicated tasks from which each testifying physician was asked to comment. According to Dr. Delgado, claimant has lost the ability to perform 8 out of the 25 tasks, while Dr. Ketchum found 10 of the 25 had been lost. Dr. Melhorn found only 4 of the 25 tasks were lost. Thus, the task loss is somewhere between 16 percent and 40 percent.

After considering the record as a whole, the parties' written briefs and counsels' oral arguments, the Board finds the ALJ's Award should be modified. The greater weight of the evidence supports the finding that claimant suffered personal injury by accident to her right

¹⁵ *Id.* at 11.

wrist on July 14, 1998, as well as an overuse injury to her left wrist, which is found to be the natural and probable result of the initial accidental injury.

While claimant's recitation of the mechanism of injury was consistent as to her right wrist, she was not wholly consistent about the onset of symptoms in her left. At the preliminary hearing, she said the symptoms in her left wrist came on gradually while at the regular hearing, she describes a more immediate onset. It is, however, uncontroverted that the nature of her work required her to use both of her hands and arms on a daily basis. Regardless of whether she physically injured her left wrist on July 14, 1998, by using her left hand and wrist more while performing her work duties after her initial injury, she aggravated, accelerated and intensified the effect of the preexisting gap between the scaphoid and lunate areas in her left wrist. This type of injury is the natural and probable result of her underlying injury and, under Kansas law, is compensable.¹⁶

When all the evidence is considered as a whole, the Board is persuaded it is more probably true than not that the bilateral scapholunate disassociation, as well as the residual carpal tunnel complaints and the ganglion cyst found in claimant's right wrist, was caused by the July 14, 1998 accident. Claimant had an acute onset of symptoms immediately following the "pop" in her right wrist. Her complaints as to that part of her body have been consistent throughout her treatment. The balance of her left hand and wrist complaints are held to be related, as they are found to be the natural and probable result of the July 14, 1998 accident. The Board is persuaded by Dr. Delgado's opinion as to claimant's over-compensation and Dr. Ketchum's opinion that the July 14, 1998 accident was the "straw that broke the camel's back."¹⁷

The Board has considered the impairment assessments offered by each of the physicians and finds that Dr. Ketchum, the treating physician, is the most persuasive on the issue of permanency. Accordingly, claimant is found to have a 20 percent to the right upper extremity at the level of the forearm, along with a 5 percent to the left upper extremity. When combined, this yields a 15 percent to the body as a whole.

Whether claimant is entitled to permanent partial general disability, beyond the functional impairment awarded above, is governed by K.S.A.1998 Supp. 44-510e(a), which provides in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent**

¹⁶ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

¹⁷ Ketchum Depo. at 32.

of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

K.S.A. 1998 Supp. 44-510e sets forth the formula for determining claimant's permanent partial general disability. But that statute must be read in light of *Foulk*¹⁸ and *Copeland*.¹⁹ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .²⁰

According to the appellate court decisions, in determining permanent partial general disability, the question is whether the worker has made a good faith effort to find and retain

¹⁸ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

¹⁹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

²⁰ *Id.* at 320.

appropriate employment. If the worker has made a good faith effort, then the actual difference in pre- and post-injury earnings is used in the permanent partial general disability formula. If the worker has not made a good faith effort, then a post-injury wage should be imputed. Consequently, workers who are earning less than 90 percent of their pre-injury wage and have acted in good faith are entitled to receive an award for work disability.

In this instance, claimant is presently running a daycare facility in her home and is earning \$187 to \$200 per week, although the evidence shows claimant has the capacity to earn at least \$260 per week, plus overtime. This was corroborated by Mr. Longacre, who testified claimant could expect to make \$6.50 as a receptionist or data entry clerk.

The Board finds that while claimant is presently earning as much as \$200 per week, she has failed to establish her good faith effort to find appropriate employment. She is capable of earning \$260 per week, and such wages should be and will be imputed to her under the principles set forth in *Foult* and *Copeland*. The Board acknowledges claimant's argument that she must incur the cost of daycare should she obtain employment outside the home. However, there is no justification to compel respondent to subsidize that cost under these facts and circumstances. Thus, the Board finds claimant has a 53 percent wage loss for the period after September 9, 1999. This is based on an average weekly wage \$548, which includes the value of benefits.²¹

As for the task loss component of the work disability analysis, the Board adopts Dr. Ketchum's task loss analysis and finds claimant has sustained a 40 percent task loss. When this figure is averaged with the wage loss figure, the resulting work disability is 46.5 percent commencing September 9, 1999.

Respondent alleges an overpayment of temporary total disability benefits because it paid weekly benefits to claimant beyond February 14, 2002, for treatment rendered in connection with Dr. Ketchum's surgery to claimant's right wrist to remove the hardware. Because this condition is found to be compensable, claimant was entitled to the weekly benefits and there is no overpayment.

At oral argument, claimant notified the Board that she had no dispute as to the number of weeks of temporary total disability paid, 29.11, but she merely believed the ALJ failed to order those benefits to be paid at the correct rate, taking into account the fact that she was terminated on September 9, 1999, and at that time, her fringe benefits ceased. Pursuant to K.S.A. 44-511 (Furse 1993), the value of those benefits are to be included and would, therefore, increase the temporary total disability rate, as well as the wage loss associated with her work disability. Although the parties had agreed to provide a stipulation

²¹ K.S.A. 44-511 (Furse 1993).

as to the dates and rate of payment of the temporary total disability benefits following the oral argument, none has been provided.²² After reviewing the record, it appears that most, if not all, of the temporary total disability benefits due to claimant occurred after the ALJ issued a preliminary hearing Order on September 9, 2000. Because this Order was made after claimant left respondent's employ, the benefits should have been paid based upon the higher average weekly wage. Thus, the Board will assume that the 29.11 weeks of temporary total disability benefits commenced on that date and will order them to be paid at the higher rate.

All other findings contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 4, 2003, is modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Melissa Wiss, and against the respondent, Lear Siegler Services, Inc., and its insurance carrier, National Union Fire Insurance Company, for an accidental injury which occurred July 14, 1998, and based upon an average weekly wage of \$548.00, for 29.11 weeks of temporary total disability compensation at the rate of \$365.35 per week or \$10,635.34, followed by 186.41 weeks at the rate of \$365.35 per week or \$68,104.80 for a 46.5 percent permanent partial general disability, making a total award of \$78,740.23.

As of February 9, 2004, there is due and owing claimant 29.11 weeks of temporary total disability compensation at the rate of \$365.35 per week or \$10,635.34, followed by 120.32 weeks of permanent partial compensation at the rate of \$365.35 per week in the sum of \$43,958.91, for a total of \$54,594.25, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$24,145.98 is to be paid for 66.09 weeks at the rate of \$365.35 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

²² At oral argument the parties agreed to provide a stipulation as to the amount of temporary total disability paid and the dates those benefits were paid. However, at the time the Order was written, no such stipulation had been received.

Dated this _____ day of February, 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Matthew Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director